United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1298

B P/S

To be argued by
JEREMY G. EPSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1298

UNITED STATES OF AMERICA,
Appellant,

—v.—

VINCENT ANTHONY MAGDA,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

The United States appeals from an order filed on March 9, 1976, in the United States District Court for the Southern District of New York, by the Honorable Robert L. Carter, United States District Judge, granting defendant Vincent Anthony Magda's motion to suppress the fruits of a search of his person, and from an order of Judge Carter, filed June 8, 1976, granting in part and denying in part the motion of the United States for reargument and modification of his original order.

Indictment 75 Cr. 942, filed on September 25, 1975, charged Vincent Anthony Magda in Count One with bank robbery and in Count Two with assaulting a person during the course of the bank robbery, in violation of Title 18, United States Code, Sections 2113(a) and 2113(d), respectively.

Prior to trial, Magda moved to suppress the fruits of a search by a New York City policeman on September 5, 1975. A hearing was held on this motion on November 26, 1975. At Magda's request, the hearing was reopened and further evidence was taken on December 15, 1975. On March 9, 1976, Judge Carter filed an opinion granting the motion. The opinion is reported at 409 F. Supp. 734 (S.D.N.Y. 1976). On March 16, 1976, the United States moved for reargument and modification of Judge Carter's opinion. On June 8, 1976, Judge Carter granted in part and denied in part the motion for modification.

Statement of Facts

A. The suppression hearing.

The Government's only witness at the hearing was Saverio Alesi, a New York City policeman. He testified that on September 5, 1975, he was on foot patrol at the southwest corner of Eighth Avenue and 43rd Street in Manhattan. (A11-A12).* At approximately 3:00 P.M., he saw Magda in conversation with a black man on the northwest corner. While they conversed, Alesi saw Magda hand something to the other man, and saw the man simultaneously give Magda something in return. The men parted as soon as the exchange was completed; the black walked west on 43rd Street, and Magda walked south on Eighth Avenue. As he was parting from Magda the black man noticed Alesi, who was in uniform. He thereupon began walking rapidly away. (A12-A14).

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* "A" refers to the Government's appendix.

Magda continued south on Eighth Avenue. As he passed Alesi, the officer tapped him on the shoulder and asked to speak with him. Magda slowed down, and Alesi asked him what had happened across the street. When Magda replied that he had done nothing, Alesi stated that he had seen Magda exchange something and asked him what it was. Magda then admitted that he had purchased a marijuana cigarette for a dollar. He then withdrew the cigarette from an inside coat pocket and handed it to Alesi. Alesi placed Magda under arrest and, after briefly looking down 43rd Street for Magda's companion, placed him against a wall and searched him. The search disclosed two items of interest in Magda's right inside coat pocket: a Browning 9 MM. automatic pistol and a note which stated: "THIS IS A ROBBERY, KEEP YOUR HANDS WHERE I CAN SEE THEM AT ALL TIMES. THERE IS TWO OF US SO DO AS YOU ARE TOLD AND NO ONE GETS HURT. PUT ALL YOUR 50's and 100's INTO THE ENVELOPE AND HAND IT BACK." Alesi then handcuffed Magda and placed him in a patrol car that he had summoned. (A14-A17).*

Alesi testified that he had been a police officer for eleven years and a foot patrolman for three and a half years. He had been patrolling the Eighth Avenue area for approximately six months. He had made street arrests for narcotics, although none in the Eighth Avenue area. He had, however, witnessed narcotics arrests by other policemen in the Eighth Avenue area, and had seen one on 43rd Street shortly before he arrested Magda. He also

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* Magda was subsequently arraigned in the Criminal Court of New York City on a complaint charging possession of a weapon and possession of a marijuana cigarette. On November 14, 1975, Judge Alfred H. Kleiman of that court granted a defense motion to suppress the gun and cigarette and the State thereupon dismissed its case.

testified that a map in his precinct house designated that block of 43rd Street between Eighth and Ninth Avenue as a "narcotics prone location." McCaffrey Park, which is between Eighth and Ninth Avenue on 43rd Street, is the subject of twenty-four hour surveillance by policemen because of the intensity of the narcotics trafficking there. The park is one hundred feet from the spot where Magda purchased the marijuana cigarette. (A11; A17-A19; A43-A44).

Magda testified in his own behalf. He stated that on the afternoon of September 5, 1975, he was walking down Eighth Avenue to the Port Authority Bus Terminal. At the corner of 43rd Street he was approached by a black man who asked him for change of a quarter, which he gave him. After parting from this man he passed Alesi, who grabbed him on the shoulder. Alesi asked him about a package which he had supposedly handed the black man and then pushed him toward 43rd Street in search of that man. When the search for the man proved unsuccessful, Alesi pushed Magda against a wall and searched him. The search disclosed the automatic pistol and the marijuana cigarette.* The demand note was not found until Magda was searched again at the precinct house. (A45-A69).

At the request of the defense, Judge Carter reopened the hearing and took additional testimony on December 15, 1975. Two of Magda's sisters, Virginia Lees and Patricia Dunbar, and Magda's mother, Margaret Magda, testified on his behalf. Each testified that she had spoken to Alesi after Magda's arrest and that Alesi had told

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* Magda testified that he had purchased a quantity of marijuana earlier that week from which he had made that cigarette. He stated that he was on his way to visit his sister in New Jersey, and was saving the cigarette to smoke later that day. (A56-A58).

her that he had found the marijuana cigarette during a search of Magda's person. (A70-A124). Alesi was recalled as a Government witness and stated that he never told any of Magda's relatives that he had found the cigarette while searching Magda. Alesi reiterated that Magda had taken the cigarette out of his pocket and handed it to him. (A126-A133).

B. Judge Carter's decision.

On March 9, 1976, Judge Carter filed an opinion granting the motion to suppress. 409 F. Supp. 734 (S.D.N.Y. 1976). In his findings of fact, Judge Carter resolved all disputed factual questions in favor of the Government. As he stated, "I accept Alesi's version of the incident", 409 F. Supp. at 737, and "I believe Alesi's version of the events more exactly accords with what took place." 409 F. Supp. at 735. Judge Carter found that Alesi had probable cause to arrest Magda once Magda had produced a marijuana cigarette. He further found that the search Alesi conducted of Magda's person that yielded the gun and the demand note was properly conducted incident to a lawful arrest. 409 F. Supp. at 737.

Judge Carter also found that the decision of Judge Kleiman in the Criminal Court that Alesi had no reasonable basis for stopping Magda was not binding upon him. 409 F. Supp. at 738. He did, however, conclude that "[s]ince the stop was made by a municipal police officer purportedly acting under state and local authority, I am required, I believe, to measure the validity of the stop by state law bench marks." 409 F. Supp. at 738. After an analysis of New York State law, particularly *People* v. *Cantor*, 36 N.Y. 2d 106 (1975), Judge Carter concluded that "[t]he stop of Magda . . .

was not based on a reasonable or founded suspicion as that term has been developed in New York's decisional law." 409 F. Supp. at 739. Accordingly, he granted the defense motion to suppress all evidence flowing from the stop.

C. The Government's motion to reargue.

On March 16, 1976, the Government moved for reargument and modification of Judge Carter's opinion. In so moving, the Government argued that even if Alesi's stop of Magda was assumed to be unlawful, the taint of this stop should not spread to all of the evidence which derived from it. In support of the motion the Government submitted an affidavit of the Assistant United States Attorney handling the case that set forth the nature and origin of the Government's evidence against Magda. (A167-A174).

According to the affidavit, Magda was interviewed after his arrest by an agent of the Federal Bureau of Investigation to whom the demand note had been given. Quite coincidentally, that agent had been assigned the investigation of a robbery that had taken place at the United Mutual Savings Bank, 20 Union Square, New York City, on August 22, 1975. A demand note had been left behind in that robbery that appeared quite similar to the note recovered from Magda. The agent therefore questioned Magda about the robbery, and he admitted that he had committed it. (A169).

Further investigation then developed other evidence against Magda. His fingerprints were sent to the F.B.I. laboratory in Washington and matched against a latent right thumbprint found on a deposit slip left behind by the United Mutual robber. The laboratory concluded that this thumbprint was Magda's. In addition, the teller victimized in the robbery was interviewed and

provided a description of the robber that precisely matched Magda, even to the extent of noting that the robber had a glass eye. (A169-A170).

On September 25, 1975, the present indictment was filed against Magda for the Union Square robbery. The Government's affidavit stated that its case against Magda rested on four factors: (a) the similarity between the note found on his person and that left behind in the bank; (b) his confession; (c) the identification of his thumbprint on the deposit slip; (d) the likelihood of his being identified by the teller. (A169-A170).

Alesi's discovery of the demand note had other consequences as well. The note left behind in the United Mutual robbery was sent to the F.B.I. laboratory and matched with other items in what is termed the "Bank Robbery Note File." An examiner concluded that the writer of that note had written notes used in six other bank robberies: in Miami (3), New Orleans, Washington, Chicago. (A173-A174). Magda was subsequently indicted for bank robbery in the Northern District of Illinois, the Eastern District of Louisiana, and the Southern District of Florida. (A170).*

D. The decision on the motion for reargument.

On June 8, 1976, Judge Carter filed an opinion (A175-A181) in which he held that all of the Government's evidence was tainted by Alesi's unlawful stop except for the testimony of the teller. He held that this

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* On March 29, 1976, Magda entered pleas of guilty in the Northern District of Illinois to the indictment pending in that district as well as to indictments pending in the Eastern District of Louisiana and the Southern District of Florida pursuant to Rule 20 of the Federal Rules of Criminal Procedure. On May 7, 1976, Judge Bernard M. Decker of the Northern District of Illinois sentenced him to a term of twenty years imprisonment.

"testimony has no relation to the activities of the arresting officer and is not tainted." (A180). In all other respects, however, Judge Carter adhered to his original ruling and held that the balance of the Government's evidence was tainted by the stop and therefore suppressed.

ARGUMENT

POINT I

The police officer's decision to stop and question Magda was reasonable and proper.

The sole impropriety that the district court found in Officer Alesi's apprehension of Magda was his decision to stop him. Judge Carter found, quite properly, that once Magda had produced the marijuana cigarette, Alesi had probable cause to arrest him. 409 F. Supp. at 737. A police officer is entitled to arrest without a warrant if he has probable cause to believe a crime has been committed. New York Criminal Procedure Law, Section 140.10(1)(a) (McKinney's 1971); see also *United States* v. *Watson*, 423 U.S. 411 (1976); *Henry* v. *United States*, 361 U.S. 98 (1959).* Judge Carter also correctly found that once Alesi had placed Magda under arrest, he was entitled to conduct a thorough search of his person. *United States* v. *Robinson*, 414 U.S. 218 (1973); *Gustafson* v. *Florida*, 414 U.S. 260 (1973).

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* Possession of marijuana, in any quantity, is at the very least a Class A misdemeanor under New York law. New York Penal Law § 220.03.

Judge Carter erred, we submit, in ruling that Alesi's decision to stop and question Magda was unreasonable. Indeed, his decision flowed from an erroneous first premise, for he held that "[s]ince the stop was made by a municipal police officer purportedly acting under state and local authority, I am required, I believe, to measure the validity of the stop by state law bench marks." 409 F. Supp. at 738. It has been held, however, in this Circuit and elsewhere that a federal court in determining the admissibility of evidence is not bound by a state standard that may be more stringent; it need only determine whether evidence has been obtained in violation of the strictures of the Constitution. *Elkins* v *United States*, 364 U.S. 206, 224 (1960); *United States* v. *Burke*, 517 F.2d 377, 382 (2d Cir. 1975); *United States* v. *Bedford*, 519 F.2d 650, 653-654 (3d Cir. 1975); *United States* v. *Keen*, 508 F.2d 986, 988 (9th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975); *United States* v. *Scolnick*, 392 F.2d 320 (3d Cir.), *cert. denied*, 392 U.S. 931 (1968).* In an afterthought inserted at the close of his opinion Judge Carter did, it is true, note that "were I to apply Federal standards I would reach the same result." 409 F. Supp. at 740. Regardless of that observation, it is apparent that in assessing the propriety of Alesi's conduct, Judge Carter derived principal guidance from the then-leading New York case, *People* v. *Cantor*, 36 N.Y. 2d 106 (1975), and devoted cursory attention to the leading cases on policemen's stops in this Court, *United States* v. *Salter*, 521 F.2d 1326 (2d

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* In *Elkins*, the Supreme Court stated: "In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." 364 U.S. at 224.

Cir. 1975); *United States* v. *Santana*, 485 F.2d 365 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); *United States* v. *Riggs*, 474 F.2d 699 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973).

The governing constitutional standards against which Alesi's behavior must be measured can be found in *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); *Adams* v. *Williams*, 407 U.S. 143 (1972); *Terry* v. *Ohio*, 392 U.S. 1 (1968); and *Sibron* v. *New York*, 392 U.S. 40 (1968). The Supreme Court stated in *Adams*:

> "In *Terry* this Court recognized that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. *Id.*, at 22. The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. See *id.*, at 23. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. *Id.*, at 21-22; see *Gaines* v. *Craven*, 448 F.2d 1236 (CA9 1971); *United States* v. *Unverzagt*, 424 F.2d 396 (CA8 1970)." 407 U.S. at 145-146.

This Court has described the test for a stop articulated in *Adams* as a "rather lenient" one, *United States* v. *Santana*, *supra*, 485 F.2d at 368 (Friendly, *J.*). It has also deemed an investigatory stop to be a "mini-

mal intrusion" into a defendant's privacy. *United States* v. *Riggs*, *supra*, 474 F.2d at 703 (Friendly, *J.*). The most recent application of the *Adams* test in this Circuit is found in *United States* v. *Salter*, *supra*, 521 F.2d 1326, which deserves consideration in some detail.

In *Salter*, two Border Patrol agents observed Salter, the defendant, escorting two women aboard a bus in Buffalo, New York. The agents, who had been conducting a routine "immigration check," asked all three where they had been born. The women answered, in a heavy accent, "Boofalo". On the basis of the suspicion aroused by this accent, the agents took Salter into a room for further questioning. Judge Friendly, writing for the Court, found the stop of Salter to be based upon reasonable suspicion within the meaning of *Adams* v. *Williams*, *supra*. The Court conceded that Salter did not have a foreign accent; all he had done was accompany two women on a bus and remain silent while they answered "Boofalo." 521 F.2d at 1328.

If the agents were justified in stopping Salter, who had himself done nothing affirmative to arouse their suspicion, we submit that Alesi was surely justified in stopping Magda. At least five factors support the reasonableness of Alesi's behavior: 1) the character of the area he was patrolling; 2) his own experience as a policeman; 3) the exchange he observed between Magda and his companion; 4) the immediate parting as soon as the exchange was concluded; 5) the more rapid departure of Magda's companion upon observing Alesi.

Alesi knew that the area in which he first observed Magda had a high incidence of narcotics dealing. A map in his precinct house designated the block of 43rd Street, between Eighth and Ninth Avenue, as a "narcotics prone" location. (A18). The extent of narcotics dealing in McCaffrey Park, located one hundred feet from where Magda was standing, was such that a policeman was assigned

full time to patrol it (A18). It is well settled that the reputation of an area for criminal activity may legitimately influence a policeman's judgment. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884-885 (1975); *United States* v. *Hall*, 525 F.2d 857, 899 (D.C. Cir. 1976); *United States* v. *Davis*, 458 F.2d 819, 822 (D.C. Cir. 1972).

Further, Alesi had been a policeman for eleven years and had made arrests for narcotics violations in the past. (A17-A18). Although he had made no narcotics arrests himself in that area, he had seen other policemen make such arrests in the very intersection where Magda was standing. (A43-A44). During his eleven years with the Police Department, Alesi had been a foot patrolman for three and a half years and had patrolled the Eighth Avenue area for six months. This constitutes, we submit, substantial experience with street crime and certainly establishes that Alesi was not a novice acting on a whim. Although Judge Carter found that Alesi lacked what he deemed the requisite "special expertise", 409 F. Supp. at 739, it is interesting to note that in an analogous evaluation of a "stop", the District of Columbia Circuit deemed "experienced and learned in their professions" two policemen, one of whom had been in the department twelve months and the other of whom had been patrolling an area for six to nine months. *United States* v. *Davis*, *supra*, 458 F.2d at 821-822.

Another important factor is the nature of the transaction Alesi observed. He saw Magda hand something to his companion and the other man hand something back. Other courts have recognized that the observation of something being passed is a legitimate ground for suspicion. *United States* v. *Hall*, *supra*, 525 F.2d at 858. *Sibron* v. *New York*, *supra*, furnishes an instructive con-

trast to this case. Sibron was observed by a policeman in a restaurant frequented by heroin addicts. The officer saw Sibron speak to several known addicts in the restaurant; he thereupon approached Sibron and asked him to step aside. He told Sibron, "[y]ou know what I am after," and as Sibron reached into his pocket, the officer also reached in and removed envelopes containing heroin. 392 U.S. at 45. The Supreme Court found the stop unreasonable because the officer had no reason to believe that Sibron had been trafficking in narcotics; it found the frisk similarly invalid because the officer had no reason to believe that Sibron was armed and dangerous. With regard to the stop, the Court found one essential component lacking in the officer's suspicion: "Patrolman Martin . . . saw nothing pass between Sibron and the addicts." 392 U.S. at 62.*

That, of course, is precisely what Alesi *did* see here. Furthermore, he saw each man pass something to the other, which is far more suggestive of a sale than a single passing of an object from one to another. Even more important, Alesi saw the two men part company as soon as the exchange was completed. (A13). The immediate parting raises the clear inference that the two men had met for the very purpose of making the exchange, and that once the exchange was completed, their business was concluded. Such an abrupt departure does not suggest the parting of two friends engaged in casual conversation.

The final factor justifying Alesi's suspicion was the apprehension displayed by Magda's companion when he observed Alesi. As Alesi testified, the man noticed him after the exchange had been completed, and then turned

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* The Court made the same point, in similar language, earlier in the opinion, 392 U.S. at 45.

quickly and walked away. Alesi could justifiably have concluded that the man had thereby expressed some surprise and discomfort at seeing him, and in turning rapidly away was trying to avoid any contact with him. Flight, or the appearance of flight, is also a legitimate source of suspicion for a police officer. *United States* v. *Davis*, *supra*, 458 F.2d at 822; *United States* v. *Hines*, 455 F.2d 1317, 1325 (D.C. Cir.), *cert. denied*, 406 U.S. 975 (1972). See also *United States* v. *Christophe*, 470 F.2d 865, 868-869 (2d Cir. 1972), *cert. denied*, 411 U.S. 964 (1973).

In sum, there was ample basis for the suspicions Alesi entertained here. The facts already recounted certainly satisfy this Court's "rather lenient" test for a stop, and they obviously exceed in probative value the evidence available to the Border Patrol Officers in *Salter*. A stop, as this Court has recognized, is a "minimal intrusion" upon the liberty of a citizen, and the available precedents in this Circuit and elsewhere suggest that such intrusions will not be deemed unlawful in the absence of evidence of arbitrary and caprious behavior.*

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* Cases that established a similar standard for stops can be readily found in other circuits. In *United States* v. *Mayes*, 524 F.2d 803, (9th Cir. 1975), the Ninth Circuit approved the stop by Border Patrol agents of a man walking along a road in a sparsely populated area two miles from the Mexican border. The only apparent suspicious circumstances was that "[h]e looked to the agents as if he had spent the night in the brush." 524 F.2d at 804. *United States* v. *Hall*, *supra*, 525 F.2d 857, provides a factual context remarkably similar to the case at bar. Two policemen had stopped a car with a broken windshield. One of the policemen saw the driver of the car pass something to Hall, a passenger, and then saw Hall leave the car and begin to walk away. This encounter, as in the case at bar, took place in an area known for narcotics activity. The District of Columbia Circuit held these observations more then sufficient to justify a stop of Hall.

Finally, we wish to note that a recent decision of the New York Court of Appeals has substantially diminished the force of *People* v. *Cantor*, *supra*, on which Judge Carter relied so heavily.* In *People* v. *DeBour*, — N.Y. 2d — (June 15, 1976), two policemen on foot patrol at midnight saw the defendant walk toward them and then cross the street when he came within thirty or forty feet of them. The policemen followed the defendant across the street and asked him what he was doing. During the ensuing conversation, one officer noticed a bulge at the defendant's waistband. He ordered the defendant to unzip his packet, and when he did so, a revolver was revealed. He was then placed under arrest. Although the Court of Appeals conceded that "this encounter was supported by less than reasonable suspicion" (slip op. at 5), it held the stop proper. It concluded that quantum of suspicion needed to justify a stop varies inversely with the degree of intrusion that the stop imposes on an individual. Mere requests for information thus require a lower quantum of suspicion than "forcible stops", which in turn require less

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* The Government maintains here, as it did before Judge Carter, that even under *Cantor* Alesi's actions were reasonable. In that case, a stop was premised on an observation of the defendant smoking a marijuana cigarette by a policeman stationed on a nearby rooftop. But this rather dubious fact was not considered by the Court of Appeals: "Considering the long distance and less than credible observations made in Brooklyn, abandoned by the prosecution and not adopted by the trial court as a justification for the police actic , the officers did not observe the defendant participate in any criminal acts." 36 N.Y. 2d at 113. Because the trial court did not credit the policemen's observations, there was no basis whatsoever asserted to justify the stop. *Cantor* thus stands for little more than the proposition that an investigatory stop cannot be made in the absence of some reasonable suspicion. That proposition has been settled law since *Terry* v. *Ohio*, *supra*. *Cantor* thus does not address the quantum of evidence necessary to raise a reasonable suspicion, which is the question at issue here.

evidence than would amount to probable cause for arrest. (slip op. at 13). Applying this sliding scale to the case before them, the Court concluded as follows:

> "Applying these principles to the instant case, we believe that the police officers legitimately approached DeBour to inquire as to his identity. The encounter here was devoid of harassment or intimidation. It was brief lasting only a few minutes and the questions were circumscribed in scope to the officers' task as foot patrolmen. Significantly, the encounter did not subject DeBour to a loss of dignity, for where the police degrade and humiliate their behavior is to be condemned. In addition, the crime sought to be prevented involved narcotics and the Legislature has declared that to be a serious crime (see, *People* v. *Broadie*, 37 NY2d 100). Moreover, the attendant circumstances were sufficient to arouse the officers' interest. The encounter here occurred after midnight in an area known for its high incidence of drug activity (*People* v. *Oden*, 36 NY2d 382, 385) and only after DeBour had conspicuously crossed the street to avoid walking past the uniformed officers. In evaluating the police action in light of the combined effect of these factors we conclude that rather than being whimsical it was reasonable. Hence the police officers were authorized to make the brief limited inquiry that they did." (slip op. at 10).

Under this reasoning, the Court of Appeals would surely have upheld Alesi's stop of Magda. It is apparent that the intrusion on Magda's liberty imposed by Alesi was minimal: he simply tapped him on the shoulder and asked him a question. As Judge Carter found, Alesi did not seize Magda or in any way attempt to restrain his freedom of movement. Alesi testified that if Magda had refused to answer his questions and simply walked away,

he could and would have done nothing. (A43). This behavior was far less coercive even than that of the policemen in *DeBour*, who ordered the defendant first to produce identification and then to unzip his jacket. Indeed, it is difficult to imagine a less intrusive encounter than that which took place here. If the actions of the police in *DeBour* were found proper, Alesi's actions are proper *a fortiori*.

In sum, if the applicable standard is one of reasonable suspicion, Alesi's actions were eminently reasonable. The decision to stop Magda was not the product of whim or caprice. Rather, it was the action of a street-wise policeman, operating in an area notorious for narcotics trafficking, who concluded that he had just seen a drug sale. This conclusion was neither outlandish nor irrational, and was amply supported both by observation and experience. Judge Carter's decision that it was not based on reasonable suspicion is therefore plainly erroneous.

POINT II

Even if the stop of Magda was improper, the evidence that derives from the stop should not be suppressed.

After Judge Carter's ruling of March 9, 1976, the Government moved for reconsideration of the scope of the evidence suppressed. (A166-A174). We conceded that the demand note itself and the confession that Magda gave to an F.B.I. agent on the day of his arrest were so closely connected to Alesi's stop that their suppression was required if Judge Carter's decision was correct. However, we argued that the exclusionary rule should not operate to preclude the introduction of evidence that Magda's fingerprint had been discovered in the bank, or of the testimony of the teller who had provided a detailed description of Magda. The Government conceded,

in its presentation to Judge Carter, that but for the discovery of the demand note on Magda's person, he would not have been identified as a suspect in the United Mutual bank robbery. The Government also disclaimed reliance on either of two recognized exceptions to the "fruit of the poisonous tree" doctrine. We were unable to show an independent source for any of the evidence against Magda, see *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920), nor did we claim that the discovery of Magda's identity as the robber would have been inevitable despite Alesi's arrest, see *United States* v. *Falley*, 489 F.2d 33, 40-41 (2d Cir. 1973); *United States* v. *Cole*, 463 F.2d 163, 173 (2d Cir.), *cert. denied*, 409 U.S. 942 (1972); *United States* v. *Paroutian*, 299 F.2d 486 (2d Cir. 1962).*

In a brief opinion, Judge Carter modified his original order to the extent of permitting the Government to introduce the testimony of the bank teller. (A175-A181). He declined, however, to permit the introduction of the fingerprint evidence. In so ruling, Judge Carter based his reasoning on a point that the Government had already conceded, namely, that the fingerprint identification would not have been possible prior to Alesi's arrest. Although Magda's status as a suspect in the robbery, and the consequent ability of the teller to identify him, flowed no less directly from the arrest, Judge Carter declined to exclude her testimony. In our view, Judge

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* As the affidavit that accompanied the Government's motion for reargument showed (A171-A172), the mere possession of a latent fingerprint left behind by the bank robber would not have led the Government to Magda. Latent fingerprints are customarily identified only when they are compared with a set of known fingerprints. The identification of the latent print as Magda's was thus accomplished only when a set of Magda's fingerprints were sent to the F.B.I. laboratory.

Carter gave no convincing reason for distinguishing between these two pieces of evidence. Both are the direct consequence of Alesi's discovery of the demand note on Magda's person on September 5, 1975.

The Government respectfully submits that this case squarely presents the question of how far the exclusionary rule should extend. In his opinion of June 8, 1976, Judge Carter chose to frame the question before him as *whether* the evidence the Government sought to introduce derived from Alesi's stop. That determination, however, was irrelevant, for the Government conceded that it was so derived. The more important question, and one that Judge Carter ignored, was, granting this derivation, should the exclusionary rule operate to preclude this evidence. The Government submits that it should not.

By way of introduction to our argument we note that Magda is concededly guilty of the robbery charged in the instant indictment; indeed, at the suppression hearing his counsel stated that Magda would plead guilty if the suppression motion were denied. (A71). There is thus no question about the reliability of the evidence suppressed. As Judge Friendly pointed out in *United States* v. *Burke*, 517 F.2d 377, 386 (2d Cir. 1975) at n. 12, "[i]n contrast to cases involving confessions or identification, where exclusion not only may tend to enforce decent police practices but may prevent the introduction of unreliable evidence, exclusion in Fourth Amendment cases generally can serve only the former function. See *Linkletter* v. *Walker*, 381 U.S. 618, 638 (1965); *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 416 (1966)." In *Burke*, Judge Friendly made one further observation whose significance in the instant case is readily apparent:

> "In *United States* v. *Dunnings*, 425 F.2d 836, 840 (2d Cir. 1969), *cert. denied*, 397 U.S. 1002 (1970), we characterized the exclusionary rule, as

> applied in Fourth Amendment cases, as being 'a blunt instrument, conferring an altogether disproportionate reward not so much in the interest of the defendant as in that of society at large'. For that reason courts should be wary in extending the exclusionary rule in search and seizure cases to violations which are not of constitutional magnitude." 517 F.2d at 286.

The case that bears most directly on the question of the exclusionary rule's application here is this Court's recent decision in *United States* v. *Karathanos*, 531 F.2d 26 (2d Cir. 1976), *cert. denied*, — U.S. —, 44 U.S.L.W. 3762 (July 6, 1976). In that case, the Government had obtained a warrant to search a restaurant believed to harbor illegal aliens. Several such individuals were indeed found on the premises during the search and the owners were subsequently indicted for harboring aliens. When the Government sought to use the aliens as witnesses at the trial of the owners, the defendants successfully moved to suppress the fruits of the search on the ground that the warrant lacked probable cause. On appeal, the Government argued, *inter alia*, that the exclusionary rule should be applied only to preclude introduction of evidence obtained during the search, but not to preclude the trial testimony of the aliens located during the search. This Court refused to limit the operation of the exclusionary rule in this fashion. In so doing, however, the Court suggested two possible limitations on the scope of the taint flowing from an initial illegal act. The Court first suggested that in considering the scope of the taint, consideration should be given to the "purpose and flagrancy of the official misconduct." Second, and apparently more significant to the *Karathanos* panel, was "the closeness of the connection between the original illegality" and the evidence which the Government seeks to introduce. 531 F.2d at 34-35.

Both of these factors militate strongly in favor of limiting the scope of the taint in the present case. Considering first the "purpose and flagrancy of the official misconduct," we think that no fair reading of Judge Carter's opinion or of the hearing record yields the conclusion that Alesi's behavior was violent, abusive or flagrantly lawless. The Government's position, of course, is that Alesi's actions were reasonable and proper. Even if this Court should disagree with that contention, we think that the question of the propriety of Alesi's conduct is properly deemed a close one. In any event, the facts as found by Judge Carter admit of only one conclusion: that Alesi was making a good faith inquiry into what he believed to be a drug sale.*

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* Alesi's conduct forms a marked contrast to the behavior of the F.B.I. agents in *United States* v. *Edmons*, 432 F.2d 577 (2d Cir. 1970), who arrested several individuals solely so that they could be displayed as suspects to witnesses to another crime. When some of those arrested were so identified, this Court affirmed the suppression of the identifications that flowed from these arrests. But Judge Friendly, writing for the Court, added an important *caveat*:

> "When the police, not knowing the perpetrator's identity, make an arrest in deliberate violation of the Fourth Amendment for the very purpose of exhibiting a person before the victim and with a view toward having any resulting identification duplicated at trial, the fulfillment of this objective is as much an exploitation of the 'primary illegality' as where a defendant is arrested without probable cause in the expectation that a search or the taking of fingerprints . . . will yield evidence that will convict him of a crime and the illegally seized objects or fingerprints are introduced at trial. *We are not obliged here to hold that when an arrest made in good faith turns out to have been illegal because of lack of probable cause, an identification resulting from the consequent custody must inevitably be excluded.*" 432 F.2d at 584 (Italics supplied).

See *Brown* v. *Illinois*, 422 U.S. 590, 603-604 (1975), where the Supreme Court followed *Edmons* in deeming the flagrancy of official misconduct a relevant factor in determining the scope of taint. See also Wright, "Must the Criminal Go Free if the Constable Blunders?" 50 *University of Texas L. Rev.* 736, 745 (1972); and *Stone* v. *Powell*, — U.S. —, 44 U.S.L.W. 5313, 5320 (July 6, 1976), at n. 29.

We concede, however, that the mere absence of abusive or flagrant police practices is not sufficient, *eo ipso*, to limit the scope of taint. Indeed this Court so found in *Karathanos*, where the underlying illegality was merely the absence of probable cause in a search warrant. The *Karathanos* Court did find dispositive, however, the closeness of the connection between the illegal search and the evidence sought to be introduced at trial. That is, we submit, precisely the point at which this case differs significantly from *Karathanos*. There, the Court found a close connection between the illegal search and evidence to be introduced at trial: "[t]he purpose of the search, as described in the application for the warrant, was to seize the illegal aliens; it is these same aliens who are now the Government's prospective witnesses." 531 F.2d at 35.

Here, in contrast, the bank robbery investigation that led to the instant indictment bears no conceivable connection to the objectives of Alesi's actions. He was investigating a street transaction in drugs, not a bank robbery; he patted down Magda to protect himself, not to uncover evidence of further crimes. The appropriate and we submit, the only sanction that should be visited upon Alesi's conduct is dismissal of the local charges for which Alesi arrested Magda. That sanction has already been imposed by the dismissal of those charges by the Criminal Court. We submit that the deterrent function that is the principal justification for the exclusionary rule in Fourth Amendment cases, see *Stone* v. *Powell*, *supra*; *United States* v. *Burke*, *supra*, is amply served by the dismissal of those charges that are within Officer Alesi's investigative purview.* Alesi was not en-

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* In *United States* v. *Janis*, — U.S. —, 44 U.S.L.W. 5303 (July 6, 1976), the Supreme Court upheld the use of evidence illegally seized by police in a civil tax proceeding brought by the Federal government. Among the reasons which supported this conclusion was the Court's observation that "the officer committing the unconstitutional search or seizure . . . has no responsibility or duty to, or agreement with, the soverign seeking to use the evidence." 44 U.S.L.W. at 5310.

gaged in investigating a bank robbery on September 5, nor was a bank robbery prosecution even remotely within his contemplation when he apprehended Magda. Unlike *Karathanos*, the instant prosecution is not a "reasonably foreseeable fruit of his search", 531 F.2d at 35, and the evidence which flows from the fortuitous discovery of the demand note should not, under the reasoning of that case, be suppressed.

The "close connection" test that this Court adopted in *Karathanos* is, of course, directly related to the deterrent function of the exclusionary rule. If there is no immediate and perceptible relationship between an illegal search and the use of the fruits of that search in a prosecution, the deterrent value of suppressing those fruits is minimal. As this Court recently observed in *United States* v. *Kurzer*, — F.2d —, Dkt. No. 75-1437 (2d Cir., April 14, 1976),

> ". . . the principal function of the Fourth Amendment exclusionary rule is to deter unlawful police conduct, *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 413 (1966), and it can be argued that it serves little deterrent purpose to exclude evidence which is only indirectly and by an attenuated chain of causation the product of improper police conduct." (slip op. at 3228).

It has also been recently observed that the deterrent function of the exclusionary rule is poorly served when the illegal search was the product of police actions taken in good faith. In *Michigan* v. *Tucker*, 417 U.S. 433 (1974), the Supreme Court stated:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to in-

> still in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." 417 U.S. at 447.

See also *United States* v. *Peltier*, 422 U.S. 531 (1975). We submit that there is no question, on this record, but that Alesi's actions were taken in good faith, and that the deterrent value of the suppression of the evidence flowing from his arrest is dubious indeed.

Finally, we direct this Court's attention to the increasing skepticism with which the exclusionary rule is viewed in the Supreme Court. In recent years the Court has held that illegally seized evidence may be introduced in grand jury proceedings, *United States* v. *Calandra*, 414 U.S. 338 (1974) and, where it was initially seized by a State officer, in federal civil proceedings, *United States* v. *Janis*, — U.S. —, 44 U.S.L.W. 5303 (July 6, 1976). The Court has regularly declined to give the exclusionary rule retroactive effect, see *United States* v. *Peltier*, *supra*, 422 U.S. 531 and the cases cited therein at 535-536. Most recently, the Court stated, in *Stone* v. *Powell*, — U.S. —, 44 U.S.L.W. 5313 (July 6, 1976):

> "Application of the rule thus deflects the truth-finding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. [footnote omitted]. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment

values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice." 44 U.S.L.W. at 5320.*

Rigid application of the exclusionary rule in this case would unquestionably preclude prosecution of Magda for this bank robbery. So drastic a result is wholly disproportionate to the wrong, if any, done Magda by a policeman who at worst made a minor error in judgment. We respectfully submit that application of the exclusionary rule here would only raise further doubts about its ultimate utility.

CONCLUSION

The order of the District Court should be reversed.

Respectfully submitted,

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* Similar doubts about the efficacy of the rule have long been expressed by members of this Court. See *United States* v. *Artieri*, 491 F.2d 440, 446-447 (2d Cir.), *cert. denied*, 419 U.S. 878 (1974); *United States* v. *Friedland*, 441 F.2d 855, 861 (2d Cir.), *cert. denied*, 404 U.S. 867 (1971); and Friendly, "The Bill of Rights as a Code of Criminal Procedure," *Benchmarks*, at 260-261 (1967).

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